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No. 1167.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

C. W. CORSAR et al.,
Owners of Ship "Musselcrag",

Appellants,

v.

J. D. SPRECKELS & BROS. CO.,

Appellees.

FILED
APR 11
1891

BRIEF ON BEHALF OF APPELLANTS,
CORSAR ET AL.

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BRIEF ON BEHALF OF APPELLANTS,
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The Ship "Musselcrag," owned by the appellants, sailed for Antwerp, laden with a cargo of cement, on the 19th day of July, 1899, bound for San Francisco. On the voyage, after reaching the neighborhood of Cape Horn, she encountered most tempestuous weather. The log book, from which the extracts printed as an appendix to this

brief are taken, shows gales of extraordinary severity beginning about the 16th of September, and continuing, with hardly the slightest abatement, until the fourth of November, *about fifty days*, at the end of which time, as the log shows, the head winds, the incessant rolling of the ship in the heavy seas which threatened to tear out her masts, the damage which the ship had already received in her rigging, and the prostration of the crew, compelled the master to look to some easier means of making his voyage than by rounding the Cape. He had already been forced to jettison cargo to save the ship from foundering (Tr. *Johnston* 66). He, accordingly, put his ship before the wind and shaped his course for the Cape of Good Hope. At this time his position was 56.34 S. and 60.34 West, about sixty miles from Staten Island (*Johnston* Tr. p. 70) and about three hundred and seven miles from Port Stanly, in the Falkland Islands (*Johnston* Tr. p. 155, answer to Int. 6). At the last named port, if the master had sought it, there were means of repairing the ship. The voyage, for many days after the course had been changed to the eastward, continued in heavy gales until about December 9th, when an interval of a few days of less stormy weather came in and lasted until the ship made Sydney, as a port of refuge. The decision to stop at Sydney was made on November 21st, because the ship's yards were in danger. At the last moment, the steering gear broke down in part.

When the ship arrived at San Francisco, her passage having been one of 313 days whereas, ordinarily, it

should not have exceeded 140 (Tr. *Johnston* pp. 65, 66), it was found that water had to a considerable extent damaged the cargo of cement. The ship was libelled by the consignees, it being charged that the damage was due to the ship's unseaworthiness and negligence. On the trial, it was urged that the ship was badly stowed at Antwerp; that too much cargo had been put in her lower hold, so that she was stiffer than she should have been. It was further urged that the master, when he was faced with inability to round the Horn, was guilty of fault in not having shaped his course for Port Stanly, in the Falkland Islands, at which place his ship could have been repaired. It was claimed that the damage to the cement must, necessarily, have taken place to a great extent during the succession of gales which occurred on the ship's voyage after she turned to the eastward.

The court below decided that the ship had been properly stowed, and that she was seaworthy. It held with the libellant, however, that she should have put in for repairs at Port Stanly, and for failure to do this, charged her with half of the damage done to the cement, upon the assumption that the damage done by sea perils prior to the time of the change of course might fairly be set down at one-half of the whole damage. It further relieved the ship from liability for the 440 barrels of cement jettisoned.

When this decision was made, the court had before it the following facts:

a. The captain's testimony that his position at the time of changing his course was in the latitude and longitude already stated.

b. The stipulated fact that the means of repair of ships were to be found at Port Stanly.

c. The testimony of two or three shipmasters that winds available to the "Musselcrag" in sailing for the east when she did, were available to make Port Stanly, if the master had desired to go there.

Inasmuch as the libel had charged no fault in the captain of the "Musselcrag" in this respect, and the master had not been examined, or cross-examined on the subject, and inasmuch as there was nothing in the evidence (as we thought) showing knowledge of a probable injury to cargo such as would demand that the master turn back in his voyage at that time, and, inasmuch, further, as it seemed that any fault thus committed, if there was one, was "a fault or error in the navigation or management of the ship" and within the protection of the Harter Act, we submitted the cause without further examination of the master, he having long before left the jurisdiction. After the decision, his evidence was taken for use on this appeal (pp. 152 *et seq.*). It shows very clearly three things: *first*, his ignorance that the cargo was in a seriously damaged condition at the time he bore away for Australia; *second*, the fact that the condition of his ship did not require such action; *third*, the fact that he exercised his honest judgment and discretion, based upon an experience of a third of a century

in those waters, in seeking protection of ship and cargo by sailing to the east.

Assignments of Error.

1:—The court erred in entering its decree in favor of the libellants in the sum of \$2,852.58.

2:—The court erred in not dismissing the libel.

3:—The court erred in its finding that it was the duty of the master to seek the Falkland Islands and in holding it to be negligence on his part that he did not do so.

4:—The court erred in its finding that the act or omission of the master, if such it was, in not seeking the Falkland Islands, was not a fault or error in the navigation or management of the ship, within the protection of the Harter Act.

We shall submit to the judgment of the court three propositions, all of which we believe will be sustained by the record and by the law. The third proposition is intended to meet the appeal by the consignees on the ground of the alleged unseaworthiness of the ship.

First:—The ship's change of course to the eastward and her failure to put into the Falkland Islands, as a port of refuge, were matters which must be determined by the master in the exercise of a conscientious and prudent judgment. For an error in his action, if events afterwards should prove there was one, the owner cannot be held liable.

Second:—If there was error in the master's failure to put into the Falkland Islands, it was an error committed in the management and navigation of the ship, for which under the Harter Act, the owner is not responsible.

Third:—The appeal of the cargo owner that the ship was unseaworthy for the voyage is not sustained by the evidence. The loss which fell upon the cargo was due to sea perils only.

I.

THE SHIP'S CHANGE OF COURSE TO THE EASTWARD AND HER FAILURE TO PUT INTO THE FALKLAND ISLANDS, AS A PORT OF REFUGE, WERE MATTERS WHICH MUST BE DETERMINED BY THE MASTER IN THE EXERCISE OF A CONSCIENTIOUS AND PRUDENT JUDGMENT. FOR AN ERROR IN HIS ACTION, IF EVENTS AFTERWARDS SHOULD PROVE THERE WAS ONE, THE OWNER CANNOT BE HELD LIABLE.

Regarding the duty of the master in such cases, the English Court of Appeal said:

“In considering what is reasonably possible, or reasonably necessary, every material circumstance must be taken into account, *e. g.* danger, distance, accommodation, expense, time and so forth. No one of these can be excluded.”

Phelps v. Hill, 1 Q. B. (1891) 611.

Capt. Johnston has now given his reasons at large (Tr. pp. 155, 156). The distance he would have had to run to the Falkland Islands was 307 miles. On the 4th of November, he did not know of any necessity for seek-

ing a port of refuge. The damage to the ship which afterwards drove him into Sydney was not known until weeks afterwards, when opportunity offered to examine conditions below decks. The continuous bad weather at those islands, had he known, when he turned eastward, of the extent of the damage to his ship, would have advised against seeking them, because of the delays to be expected in the repairing. Besides this, the scarcity and uncertain ways of workmen there who were to be had from a population of 600 to 700 (*Encycl. Brit.*) would delay repairs, further injure the cargo and cause an enormous expense, not to ship alone, but in part, in general average, to the cargo. These islands are notorious to all ships and owners of cargo, as the port of ports for inordinate expenses.

Capt. Johnston believed he would, soon after changing his course, strike better weather. Altogether, in the exercise of his judgment as a prudent, experienced shipmaster, these considerations appealed to his resolution most strongly (*Johnston*, pp. 155-157).

In the case *Turner v. Protection Co.*, 25 Me. 515 (quoted as authority by the English Court of Appeals in the case above cited), it was said:

“The master in most cases must be the principal judge of the degree of peril to which his vessel is exposed and of her ability to proceed with safety to a nearer or more distant port and of the facilities for repairing her at different ports. If he is competent and faithful, his decision respecting these matters, made in good faith, should be satisfactory to all interested, although he may err in judgment.”

Capt. Johnston says:

“When I bore away to the eastward, *I believed my ship was in a fit condition to carry her cargo safely to San Francisco without any repairs.* My object in going east was to complete the voyage to San Francisco as soon as possible under the circumstances. * * * I further considered that the most prudent and proper course to pursue was to get my cargo to its port of destination as quickly as possible and without detention for repair and probable discharge and re-stowage.”

(*Johnston*, pp. 155, 156.)

“It is a general principle of law, that every man is presumed to do his duty until the contrary is shown; and *a fortiori*, this doctrine applies to the perilous responsibility of a master in ordering a sale of his ship.”

Robinson v. Commonwealth, 3 Sumn. 227.

We submit, that in the conceded facts, the master of the “Musselcrag,” an experienced and prudent officer, not only did not commit a legal fault, but that his action was beyond criticism.

II.

IF THERE WAS ERROR IN THE MASTER'S FAILURE TO PUT INTO THE FALKLAND ISLANDS, IT WAS AN ERROR COMMITTED IN THE MANAGEMENT AND NAVIGATION OF THE SHIP, FOR WHICH, UNDER THE HARTER ACT, THE OWNER IS NOT RESPONSIBLE.

The Harter Act provides in its first and second sections (27 St. 445) that it shall not be lawful for the master or owner of a vessel to insert any clause or agreement in a bill of lading whereby he

“shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge.”

Section 3 provides that if the owner

“shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel.”

The court below found that the “Musselcrag” started upon her voyage in a seaworthy condition in all respects. The presumption is that the vessel was seaworthy. The fact of her seaworthiness in her hull and stowage is sustained by the proofs. We shall return to this branch of the subject under the next head. We assume for the purposes of this branch of the argument that the shipowner was, as regards seaworthiness of his vessel, in a position to invoke the exemption given by the act, if the cause of loss was one which falls within its terms.

The libellant below insisted and the court (as would appear) decided that the loss of cargo incurred after the deviation from the intended rounding of the Cape, though due to the perils then encountered, would have been avoided, if the ship had turned back and sought refuge and repairs in the Falkland Islands. Her failure to do this, it was held, was a failure of duty in the “custody, care or proper delivery” of the cargo, as defined in Sect.

2 of the Act, and made the ship responsible. The ship-owner contended that if the master was guilty of fault at all, that fault was committed in the "management of the ship," not in the "custody, care, or proper delivery, of the cargo," and that the ship was exempted from liability by Sect. 3, which has been already quoted. The libellant offered the case *Knott v. Botany Mills*, 179 U. S. 69, as conclusive, but we submit that that case simply decided that the stowage of sugar in such a place that it would drain liquid upon wool stowed next to it, was primarily *bad stowage*, even though the wetting of the wool was caused by a change in the ship's trim brought about by the stowage. This change of trim was not "management of the ship," but a mere incidental result of stowage in a particular way. Judge Brown of the District Court, whose opinion (76 *F. R.* 584) was quoted from by the Supreme Court admitted, however, that if the change of the ship's trim had been done designedly "and primarily with reference to the ship, and for the benefit of the ship, or with a view to her sea going qualities," then the change of trim would have been an act in the "management of the ship." The case, certainly, does not support the view of the court below in the case at bar. Now, in the case of the "Musselcrag," the cargo was originally properly stowed and its wet condition, after the ship had encountered the heavy weather of the voyage, was not known to the master. At Sydney, it seemed to be in good order, except for stains (Tr. p. 157). But if this had been known to him, the fact would still remain that the fault, if there was fault

committed in not seeking a port of refuge, was one *in the navigation or management of the ship*. It is the very essence of the statute and the prerequisite of its application, that its exemption shall cover the consequences of the management or navigation of the ship *upon the cargo*. Loss or damage which follows upon such mismanagement does not refer to loss or damage to the ship herself.

“The whole object of the Act is to modify the relations previously existing between *the vessel and her cargo*.”

The Delaware, 161 U. S. 471.

Nor does the Act refer to the management of the ship as regards other ships. Liability arising from collision with another vessel, it has been expressly held, is not intended to be covered by the Act (*The Delaware*, 161 U. S. 470), yet *loss of cargo* carried by the vessel in fault, though caused by negligence, is covered by the very terms of the Act and does not create a liability.

The Viola, 59 F. R. 632.

It is clear, then, that the management or navigation of the ship, referred to in the Act, must be with reference to its effect upon the cargo only, and that its provisions cannot become operative, unless cargo be lost, or in some way affected by failure to properly manage the ship. “Custody” and “care” of cargo, it is true, are, in a sense, wanting, if a ship be negligently run upon a rock, or into collision, resulting in damage to cargo, yet it is conceded that, under the Act, the ship

is not responsible for such loss. Within the object and meaning of the law, such losses cannot be due to fault in "custody" or "care" of cargo, but only to fault in the management of the ship. When the mind contemplates the fact that ship and cargo become a single thing on a voyage that management of the ship very often affects care of the cargo, and that custody and care and stowage of the cargo as often affect the navigation or management of the ship, and that the Act intends to *abrogate* the rule of the common law, so far as the latter creates liability for loss of cargo caused by fault in navigation or management of the ship and, on the other hand, to *maintain and emphasize* the liability created by the common law for a loss caused by the ship's default in properly guarding or caring for the cargo, it seems difficult to reconcile the provisions of the law and to avoid the conclusion that they practically nullify one another. Careful consideration, however, shows that there is no inconsistency, and that a rule can be laid down, which will enable courts to determine, with certainty, the rights of parties. That rule is that where an act is done, the *primary object* of which is the navigation or management of the ship, such act, though faulty or negligent, and though it involve, in its results, the cargo, creates no liability. On the other hand, if the act primarily is done in the custody or care or delivery of the cargo, and the act be negligent, a liability exists, notwithstanding the fact that, broadly speaking, it must be conceded that such act was bad management of the ship.

In *The Sylvia* 171 U. S. 462, it appeared that the master of a ship had failed, on leaving port, to close the iron shutters of a port hole. The glass door was closed. When the ship started, the weather was fair. The hatches were battened down, but it was easy to remove them and there was no cargo near by to prevent access to the port hole. In the afternoon, rough weather came on, which broke in the glass shutter and flooded the compartment, thus damaging certain merchandise. The court held that the failure of the ship to close the iron shutters before departure did not make the ship initially unseaworthy. It did not hold that the omission to close the shutter when rough weather came on was a fault in "custody or care of the cargo," though, in ultimate effect, it undoubtedly was such, but held that the closing of the shutter was primarily a matter affecting the management of the ship, and that the failure to perform that duty was *a fault or error in its navigation or management*, for the consequences of which neither ship nor owner was responsible by reason of the exemptions of the Harter Act. The court said (p. 466):

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel, within the meaning of the Act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry the cargo. But they do include, at the least, *the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas*; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or

management of the ship. This view accords with the result of the English decisions upon the meaning of those words.”

In the case at bar, the failure to take the ship into a port of refuge presents no nice question of the use, or failure of the use of appliances on board. The act done was clearly in the management of the ship, as a whole. It was an act in “navigation and management,” within the very words of the exemption of the Act. The English cases which are approved by our Supreme Court are even more decisive.

In *Dobell v. Steamship Rossmore*, 2 Q. B. (1895) 417, *Lord Justice Kay*, in a case in which the question was, whether a port hole which has been left insufficiently fastened when the voyage began and with cargo stowed up against it, so that it could not be reached without great delay, constituted unseaworthiness, or was a fault in navigation or management, said:

“I incline to think, contrasting the various clauses of the bill of lading that the expression ‘faults or errors’ in navigation or in the management of said ‘vessel’ applies rather to faults or errors in sailing the vessel, or in managing the sailing of the vessel.”

Lord Justice Smith, referring to Section 3 of the Act, says:

“I may say, however, that the meaning of the section is that, if the shipowner by himself or his agents uses due diligence to make the ship seaworthy when she starts, he shall not be liable for what hap-

pens afterwards when the ship is at sea and he has no more control over her.”

In *Canada Co. v. British Owners Assn.* 23 Q. B. Div. 344, Lord Justice Bowen said:

“Navigation must mean something having to do with the sailing of the ship; that is, of course, the sailing of the ship having regard to the fact that she is a cargo carrying ship.”

In *Carmichael v. Liverpool etc. Assn.* 19 Q. B. Div. 247, Lord Esher, Master of the Rolls, said:

“The question must be: what is the interpretation to be put on the words ‘caused by improper navigation.’ It seems to me that they do not refer simply to improper navigation with regard to the ship herself, *but also to improper navigation with regard to the safety of the goods of the ship.*”

Fry, L. J. said:

“We have to construe the words ‘improper navigation of the ship,’ with reference to the loss or damage of or to any goods or merchandise carried by the ship.”

Lopes, L. J. said:

“The important words are ‘improper navigation’ and the court has to determine what is the meaning of improper navigation. In my opinion, improper navigation means the improper management of a ship *in respect of her cargo * * * during the voyage.*”

In the case at bar, what may we suppose to have been the thought uppermost in the master’s mind, when

after *seven weeks* he found that there was, seemingly, no end to the fierceness of the gales, that his sails and ship's gear had been tried to their utmost, that his crew were battered, wounded and exhausted, that his ship was deeper in the water than she should be? Was the thought one which was in the nature of an inquiry as to *how he should dry out the top tiers of cement* which he may have had reason to think, or which he may have known had been wet by sea water, or was it one which asked of his judgment and experience: *What is the best way of getting my ship out of this trouble, so that my voyage may be performed?* Shall I still seek to make the passage round Cape Horn, or shall I seek the easier voyage round the Cape of Good Hope, or shall I seek shelter at some port?

In any one of these cases, his decision must have been as to how he should navigate or manage his ship. In none of them, would he have acted *primarily*, with reference to the care, or custody of the cargo. The care and custody of the cargo were purely incidental. "What course shall I steer, in view of the perils surrounding me?" was the question which was answered by the order to bear to the eastward. If the master's judgment was erroneous, the error lay in the mistake which he made in choosing one, instead of another of the courses offered. His duty was to get his ship and cargo to their destination. In the performance of this duty, he is said to have made a mistake, *by taking his ship in one way, instead of in another*. The error was clearly

Master's performance, or non-performance of duty in repairing at port of distress is "management of ship" ----
Judge Brown in The Guadalupe, 92 F.R.670.
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an error of navigation and management, although there was cargo on board which, perhaps, would have been saved from greater damage, if he had followed one course rather than another. But possible, or probable, or certain injury to cargo, in such case does not change the character of the fault. The master acted as he did in managing his ship and we have seen that there is no fault of navigation, or management of the ship conceivable under the Harter Act, which does not affect the custody and care of the cargo in greater or less degree. *The cargo must be damaged by such fault* in order that a case may be presented of common law liability in which the Act may interpose to save the ship-owner, who is the beneficiary intended by its exemptions.

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In *The Glenochil* (1896) Prob. 10, one of the cases cited as authority by the Supreme Court in *The Sylvia*, Sir F. H. Jeune says, speaking of the Harter Act (p. 14):

“No doubt the object of S. 1 is in terms to prevent clauses being inserted in mercantile instruments which would exempt the carrier from want of proper care in regard to the cargo. It is obvious that those words cannot be taken in their largest sense, because in a secondary, though not primary sense, *any mismanagement of the ship, in navigation or otherwise*, is want of proper care as regards the cargo. But it is clear that it was intended by S. 3 to exempt from liability for loss or damage resulting from faults or errors of navigation, or in the management of the vessel; and the way in which those two provisions may be reconciled is, I think, first

that the act prevents exemptions in the case of *direct want of care in respect of the cargo*, and secondly, the exemption permitted is in respect of a fault *primarily connected with the navigation or the management of the vessel*, and not with the cargo.”

The case quoted from is in its facts an extreme case. The ship had performed her voyage and having been partly discharged, required stiffening. Water was accordingly pumped into one of her ballast tanks. Owing to inattention, it was not known that the sounding pipe and casing had become broken on the voyage. The water leaked through these upon the cargo and damaged it. It was held by the court that the fault was in the management of the ship, within the meaning of those words in the Harter Act.

The Circuit Court of Appeals of the Second Circuit analyzed the Act of Congress in the same way, but from the point of view of the cargo owner, when, in *The Germanic*, 124 F. R. 1, it approved the following language:

“The fact that an act primarily having to do with cargo must incidentally affect the ship, does not bring it within the class of acts done in the management of the ship. If the particular manner of performance adopted is not adopted with a view to its effect upon the ship, but does affect the ship in a way that causes damage to the cargo, the ship is not exempted from liability. * * * The controlling fact is that the effect on the ship is produced without intention and by accident. The negligence is in the manner of performing the act intended, to-wit, the act having to do with the cargo. It is not in the management of the ship, because no act intended to affect the welfare of the ship is being performed.”

In this case, the ship, after arrival, sank at her wharf, because of "the hurried and improvident removal of her cargo." She became topheavy, lurched over so that she took in water through an open coal port and sank, destroying what cargo had not been removed. The fault was in the stevedores. The court held that this careless removal of cargo by the owner's shore agents had no relation to the management of the ship, but was a fault in unloading or delivery of cargo. The effect upon the ship, though unmistakable and seemingly very direct, was purely consequential upon an act done primarily with reference to the cargo, not the ship.

"It was not undertaken with the intent to benefit, influence or change her in the remotest particular. It dealt with the cargo as distinguished from the ship" (p. 6).

The Glenochil and *The Germanic* aptly illustrate the argument which we make.

In *The Merida*, 107 F. R. 146, it was held that failure to pump out the ship's bilges during the voyage, by reason whereof the cargo was damaged, was a fault *in the management of the ship*. It is quite clear that the same rule must govern, whether *the ship is so managed* that water goes through her decks, or that after it gets into the ship, it is not pumped out. The intention of the Act clearly is that the owner shall be required to furnish a good ship and that his servants shall properly stow the cargo. Thereafter, while the ship and her management still remain beyond his reach he is exempted from liability for damage to cargo, caused by his servants' acts,

until the destination shall be reached and the ship shall be again under his control for delivery of the cargo.

We submit that the act complained of by the libellants below is not one for which the law gives any right of action.

III.

THE APPEAL OF THE CARGO OWNER THAT THE SHIP WAS NOT SEAWORTHY FOR THE VOYAGE IS NOT SUSTAINED BY THE EVIDENCE. THE LOSS WHICH FELL UPON THE CARGO WAS DUE TO SEA PERILS ONLY.

It is recognized as the law that, with reference to the contract of carriage, as well as to the contract of insurance, the presumption of law is that a ship is seaworthy for her voyage. The burthen of proof to the contrary is on him who asserts the unseaworthiness. The Supreme Court has said:

“By the third section of that Act (Harter Act) the owner of a seaworthy vessel (and, in the absence of proof to the contrary, a vessel will be presumed to be seaworthy) is no longer responsible to the cargo for damage or loss resulting from faults or errors in navigation or managment.”

The Chattahoochee, 173 U. S. 550;

The Wildcroft (C. C. A.) 130 F. R. 521, 527.

The ship's contract is one of insurance against all perils not excepted by the bill of lading. The burthen of proof is upon her, therefore, to prove that the loss occurred by reason of such perils. Proof that on the voyage she encountered such perils and that they were

sufficient to account for injury to a seaworthy vessel, coupled with the presumption above stated, exonerates her, unless it be shown by him who asserts the fact, that the vessel was not seaworthy for the voyage. And if it be shown that, in a particular respect, it might be surmised that a vessel was not as strong, or as perfect as she might have been made, it is a sufficient answer, if seaworthiness be shown by general evidence. Such evidence, in connection with the proved sea perils is enough to exonerate the ship, in the absence of satisfactory countervailing evidence of a positive defect existing at the time of sailing.

“Where it satisfactorily appears that the vessel encountered marine perils which might well disable a staunch and well-manned ship, no such presumption (unseaworthiness) can be invoked. And where for a considerable time, she has encountered such perils and shown herself staunch and strong, any such presumption is not only overthrown, but the fact of her previous seaworthiness is persuasively indicated.”

Warren v. Adams (C. C. A.) 74 F. R. 455 and cases cited.

The Supreme Court denied a motion that *certiorari* issue to review this case, 163 U. S. 679.

In the case quoted from, the damage to the cargo arose from leaks caused by the coming out of the oakum in the seams of a vessel's centreboard. It was shown that prior to departure, a carpenter had looked the vessel over, including the centreboard, and tried some of the seams. Sea perils having been shown, the court

declined to condemn the vessel simply because the carpenter had not tried *all* the seams of the centreboard.

“It is reasonable to assume,” it said, “that those he did examine were in such condition as to justify an experienced man in believing that a more critical examination was not necessary.”

In the same court, the same question again came up in a later case. Water came into a steamship through a rivet hole during most tempestuous weather. Unseaworthiness was charged owing to the defective rivet, the head of which had come off. The fact of the defectiveness was admitted, but it was of a nature which would not have required that it should be pronounced to be unfit to stand the test of the contemplated voyage. The court said:

“There was no leakage during the first two weeks of the voyage. The sluices were opened February 14th and no water was found. *Owing to the continually heavy weather that followed*, they were not again opened until March 6th, and it was during the intervening time that the rivet became loosened. The excessive strain to which it was subjected during the exceptionally heavy weather of this period of 20 days in which it broke, adequately explains the cause of the mishap.”

The Sandfield, 92 F. R. 664.

“The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.”

The Sylvia, 171 U. S. 464.

Capt. Johnston, of the “Musselcrag,” a master of 20 years’ experience, joined the ship immediately prior to

the voyage in question. The ship was four years old. He examined her and found her in good order. She was then in dock. She was thoroughly cleaned and overhauled and painted inside and out (*Johnston*, pp. 52, 53). The master explains that the vessel was beamy and naturally stiff, but not unusually so (*Johnston*, p. 54). To avoid having the ship too stiff, apparently under the owner's instructions (*Johnston*, p. 54), the cargo was so stowed as to throw as much weight as reasonably was possible into the upper part of the hold and the between decks. In stowing the cement, the ends of the ship were left empty, as air spaces to give buoyancy; the cargo was "raised" by the laying of inch boards on the barrels, beginning with the sixth tier, and carrying this division between tiers on upwards. The unfilled space, except as filled by the boards, amounted to the height of one tier and there was still room, not used, between the stowage and the between deck beams for another tier. More than the usual allowance was thus made for the natural stiffness of a beamy ship. The custom at Antwerp was to begin "raising" with the eighth tier from the bottom. In this case, "raising", as we have seen, was begun with the sixth tier. When full, the "Musselcrag" was loaded with 2350 tons in the lower hold and 928 tons in the between decks. Thus loaded, she was down to her marks as she lay in the river. On reaching salt water, she would rise six inches and become still more buoyant. In the judgment of the master, she was well

The depositions of Abt and Hazen confirm the character of the stowage (Tr. p. 75). They were the stevedores, chosen by the charterers under the privilege demanded by them in the charter party (*Johnston*, p. 73). The carpenter (*Milne*, p. 22) also confirms the character of the stowage. The ship's decks had been caulked before starting on the voyage from the South American coast to Liverpool and were in good order. The ship's carpenter carefully overhauled them and tested them at Antwerp (*Milne*, p. 23). The caulking was done in October, November and December and should last two years (*Milne*, pp. 33, 34). The ship sailed from Liverpool in July of the next year (*Johnston*, p. 55). The caulking, therefore, was six months old. The sail equipment of the ship was perfect (*Lawson*, sailmaker, p. 34). The ship carried 35 tons more of cargo on her outward voyage from San Francisco (*Johnston*, pp. 52, 55) than was in her on this voyage.

After the vessel sailed from Antwerp nothing of material importance happened until she reached the River Platte. The log shows that there was a slight weeping of seams in the forehold after the ship had got to the region of Cape Horn, "a drop now and again " from the seam * * * a very common occurrence". These were put into good condition (*Milne*, carpenter, pp. 23, 24). Slight leaking was found the 29th of September, after some heavy weather had been experienced. The decks were not weeping to any great extent (*Captain Johnston*, p. 59; *Milne*, p. 32).

“It is a general occurrence with a good many vessels that some of the seams weep a little, after you get through the very hot weather of the tropics” (*Milne*, p. 32).

The ship's record down to the time when she struck frightful weather off the Horn is evidence that she was seaworthy in stowage and hull and equipment when she sailed. Her survival of the gales encountered without loss of her spars, proves that the danger did not come from the method of her stowage. It is claimed that the ship rolled and strained, so that her decks opened and that she suffered other injuries, and that these were all primarily due to bad stowage, viz: the excess of weight in the ship's lower hold beyond what it should have been, but it is well known that excessive rolling is very often the result of a ship's build and is inevitable, though the ship be entirely seaworthy. One of the most modern and magnificent of the Atlantic liners, “Kaiser Wilhelm” was generally known among tourists as “Rolling Billy”. She became so unpopular that her name had to be changed. She was dubbed “Hohenzollern” and a new ship which did not roll so much was given the old name. If there be one thing that the architects of such a vessel sought to secure in designing her, it was to make a comfortable steady vessel. There is no evidence that rolling did any damage to the “Musselcrag”.

“The ship had behaved well up to the time we reached the Horn. She had given no evidence of being too stiff or too cranky” (*Capt. Johnston*, p. 56).

“The ship rolled heavily in the strong breezes of wind, but nothing particularly *with the cargo she had in. Cement is a very bad cargo for a vessel to roll with.* The cargo was high enough up in the ship” (*Milne*, pp. 28, 29).

“Coming to the Horn, the ship behaved very fair, pretty good. She was all right until we got down there. She did not roll or strain a great lot; she was all right, like any ordinary ship” (*Faraday, second mate*, pp. 42, 44).

“The rolling of a ship in heavy weather is *a sea peril*” (*The Manitoba*, 104 F. R. 145, 153, by Judge Brown).

In opposition to the foregoing evidence of men who saw the ship stowed and did the stowing either actually or by superintendence, including the stevedore selected by the libellants' agents, and of those who tested the stowage by actual experience on the voyage, we have the evidence of the San Francisco stevedores and two British shipmasters. Three of these witnesses testify that in their opinion the ship was too stiff; that she had too much cargo in the lower hold, as compared with the between decks, and that she would roll and strain more under such circumstances than if she had 100 tons less weight below. These facts do not prove unseaworthiness, if they be conceded. It was admitted by one of these masters that the stevedore who loads the ship and her master are the best judges of how a vessel should be stowed (*Steele*, 124). When the evidence of these masters is read in the light of the facts, when their readiness to swear that the weather shown by the log was *mere ordinary Cape Horn weather* is made to

appear, there is no question that they came to court not as experts, but as advocates for the cargo owner. A new ship starting on her maiden voyage, or an old ship starting from a foreign port under a new master, must be stowed on judgment to some slight extent. Experience only will tell whether she be a little stiff, or cranky, and this experience is utilized at the first opportunity by the master, upon whom, if a slight change be desirable, devolves the duty of re-stowing a part of his cargo, so as to offset either the crankiness, or stiffness. A similar duty falls upon him when his cargo is found to have shifted dangerously. The necessity imposes upon him the taking of required action as a duty in navigating his ship. The master of the "Musselcrag" did this very thing when he found that the effect of the gales which caused a wetting of cargo, was lessening his ship's buoyancy. The necessity of re-stowing, if it was found to exist after leaving port upon meeting heavy weather, but was not known to exist when he did leave port, or for weeks thereafter, does not prove that the ship left in an unseaworthy state.

"A ship may be seaworthy when she sails, although she could not safely perform the voyage *in the precise state in which she sailed*. Hatches may be off in the ordinary course, or a porthole may be open, but in such a position that it can be, and will in ordinary course be closed after sailing. Those are not cases of unseaworthiness."

Carver, Carriage by Sea, Sec. 18.

If it be true that the ship was a little too stiff to meet a very heavy sea with the best advantage, and that re-stowage was necessary, that would not be a case “ of initial unseaworthiness, but of neglect or default in “ the prosecution of the voyage”, if the master should have rectified the matter and failed to do so.

The words quoted are those of Lord Herschell, referring to a porthole left open on starting, which could be closed later on.

Gilroy v. Price (1893), A. C. 64;

Hedley v. Pinkney (1892), 1. Q. B.;

Steel v. State Line, 3 A. C. 72.

Two of the cases cited came up for discussion under the clauses permitted by English, but not by our law, exempting the shipowner from the consequences of the neglect of the master on the voyage. The question was whether the loss, which was caused by an omission to close a pipe in one case and a porthole in the other, each left open when the ship sailed, was due to a ship “initially unseaworthy”, or to negligence in carrying on the voyage. The same point came up before our Supreme Court in a case already quoted from. A steamer leaving port in fair weather had closed only the glass door of a compartment porthole. The iron door, necessary in rough weather, was not closed. *The hatches had been battened down*, but these could easily be taken up, and as no cargo had been stowed against the porthole, the latter could be reached in case bad weather should come on. The court held that the ship

did not start unseaworthy and that the injury to cargo was due to the fault of the master in failing to close the iron shutters when this was required, and that under Section 3 of the Harter Act, the owner was not liable for this fault, because it was one which occurred in the navigation or management of the ship.

The Sylvia, 171 U. S. 465;

In *The Irriwaddy*, 171 U. S. 193, the Supreme Court took occasion to say that the Harter Act was enacted to place American shipowners on an equality with English shipowners in regard to the risk of the shipowning business; in other words, to give to them the exemption against the negligence of the master or crew which the authorized terms of the English bill of lading gave to the English shipowners, but it was provided by the Act that such shipowners must, initially, have used due diligence in making their ships seaworthy.

The regulation of the trim of the ship is a part of the management of the ship and hence within the Harter Act, where such regulation is done, or should be done primarily with reference to the ship and for the benefit of the ship.

Botany Mills v. Knott, 76 F. R. 584.

If, then, the ship started seaworthy as to stowage, the fact, if true, that she afterwards required to have her trim changed to meet different conditions, imposed a duty on the master, *in the management of his ship*, to make such changes as might seem to be necessary. If

he failed in this regard, though the cargo suffered, the owner is not liable. The stiffness thus produced affected the ship directly. It affected the cargo only as a consequence of the effect on the ship. In view of the evidence, however, the point is hardly one under discussion. The access of water to the cargo when the heavy gales came on, the absorption of water by the cement, thus giving the pumps no chance, (*Johnston*, p. 60) did make the ship too deep and compelled the master to move some lighter stuff from the hold to the between decks and to jettison 400 to 450 barrels of cement (*Johnston*, p. 66; *Faraday*, p. 45). This sacrifice eased the ship, which was suffering the most severe kind of weather and carrying a saturated cargo; yet these barrels, giving them two hundred pounds apiece, did not weigh more than 40 or 45 tons. How, then, shall it be said that this ship started *two months* before that time so deeply or so badly laden, that she must be held to have been unseaworthy at that time? As we have seen, she carried a still heavier cargo on her outward trip.

THE DAMAGE DONE WAS CAUSED BY SEA PERILS.

We shall not attempt to argue this proposition. The evidence is clear that the weather encountered was of unexampled ferocity. The witness, Capt. Quayle, called by libellant, had some strange motive swaying him when he declared that he had read the log and that it disclosed only ordinary Cape Horn weather.

“Whether decks be new or old, the pitching and twisting and pounding of the vessel in such weather will be likely to cause a leakage. Such a result cannot, therefore, under such circumstances be accounted evidence of unseaworthiness, *even when the tempestuous weather is anticipated at starting.* It is not clear, however, that any damage was sustained from leakage until after the hurricane or cyclone was encountered beyond Point de Calle. The weather through which the vessel then passed is amply sufficient to account for the crippled condition in which she reached Bombay, *without the aid of any inference of unseaworthiness at starting.* But for this storm, I find nothing to justify belief that she would not have continued her course and reached Aden safely, with little or no loss to cargo. In that case, the question of seaworthiness could not have arisen, and what is now said of her decks, overloading, insufficiency of fuel, would not have been thought of. It is inspired by the desire to find some other cause of disaster than the storm—a sufficient, the most obvious cause—and thus to charge the vessel with loss, which otherwise the libellant must bear.”

The Marlborough, 47 F. R. 670.

This court may say, with the Court of Appeals in *American Sugar Co. v. Rickinson & Co.*, in 124 F. R. 188, 192, where experts were called to overthrow uncontradicted direct evidence:

“Having found a perfectly plain and adequate cause for the damage we are not required to resort to speculation and guess work to find an additional cause,”

or, in view of the strenuous efforts of libellants' experts on weather to show that extraordinary gales mean merely

ordinary weather, it may say, with Sir Robert Phillimore:

“I am unable to draw the distinction forced upon me between *ordinary* and *extraordinary* perils. In truth, it may be said that the way in which the cargo was stowed was, more or less, a cause of the damage; but I am of opinion that the evidence shows that the cargo was stowed in the ordinary way and if the bad weather had not occurred, and the straining had not taken place, the cargo would, I think, have arrived without damage, and consequently *the proximate cause of the damage must be taken to have been the perils of the sea.*”

The Catharine Chalmers, 2 Asp. Mar. Cas. N. S. 599.

The charter party provides that the libellants' appointee at the port of loading shall act as stevedore in loading the ship, but at ship's expense and under the master's direction (Tr., pp. 73, 130). Although we do not, under this clause, question the ship's responsibility for stowage affecting her seaworthiness, if such there was, still the legal effect of the clause is to make the stevedore, in the general sense, the *charterer's* servant.

The Catharine Chalmers, 2 Asp. Mar. Cas. 598;

Harris v. Best, 7 Asp. Mar. Cas. 274;

Blaikie v. Stenbridge, 6 C. B. N. S. 894;

Guerard v. The Lovspring, 42 F. R. 856.

The charter party does not say that such stevedore as the charterer may select shall be *employed by the ship*. The cases cited show that the privilege of appointment of the stevedore stipulated for by the charterer carries

with it the burthen usually borne by an employer as to all stowage not affecting seaworthiness. Our reference to this matter, however, is simply to call to the attention of the court the fact that the ship was loaded by experienced stevedores employed by the libellants *for their own protection*, and that the master, an experienced officer, supervised the work on behalf of the ship. Both had one and the same duty to perform on behalf of their respective principals. Both have testified that their duty was properly performed, the stevedores having been examined on behalf of the libellants, the master on behalf of the respondent. They knew what they did and upon them was the responsibility of properly doing that for which they were paid. The libellants now seek to show by a couple of San Francisco stevedores and two roving shipmasters that the ship was badly laden *by the stevedores of their own selection*.

We respectfully submit that the fact of the unanimity of the stevedores and master in declaring the stowage good, the presumption that they did their duty and that the stowage, therefore, was good and the overwhelming proof of extraordinarily violent weather on the voyage, amply sufficient to account for the damage done, must overcome the opinions of the San Francisco witnesses which betray an eagerness to testify approaching partiality and which, at best, are arguments after the event. Surely such evidence as the libellants adduce does not sustain the burthen of proof cast upon them by the respondent's case.

We have caused to be printed, as part of this brief, such portions of the log book as show the nature of the weather through which the ship went.

In conclusion, we submit that, as regards the defense of sea perils, we have fully sustained the burthen cast by the law upon the ship and that the libellants have failed to maintain their charge of bad stowage creating unseaworthiness. We have, also, shown that, at the maritime law, no blame can be charged against the master for the honest exercise of his judgment in deviating as he did, and that, if culpability has been shown, the error was committed in the "navigation or management of the ship," not in the "care or custody of the cargo".

We ask that the decree below be reversed and the libel dismissed.

Respectfully,

PAGE, McCUTCHEN & KNIGHT,

Proctors for Appellants.

APPENDIX.

EXTRACTS FROM LOG OF BRITISH BARK "MUSSELCRAG".

- Sept 11, 4 A. M. Fresh breezes; shipping quantities of
 " " water amidships.
- " 11, P. M. Fresh breezes; head sea; shipping
 " " quantities of water amidships; under top-
 " " gallant sails.
- " 14, A. M. Heavy jump of head sea.
- " 15, P. M. Fresh breezes; head sea; shipping
 " " water at times.
- " 16, P. M. Head sea making. A. M. Shipping
 " " water forward and amidships.
- " 17, P. M. Fresh breezes, with head sea; midnight,
 " " still heavy sea, with S. W. squalls; 8 A. M.,
 " " stowed mainsail, with violent rolling.
- " 18, P. M. Ship rolling heavy; 5:30 A. M., weather
 " " more mild; carpenter caulking main deck.
- " 24, 4 A. M. Heavy head sea; ship plunging; ship-
 " " ping water amidships.
- " 25, P. M. Rolling and pitching heavily under top-
 " " sails and full mainsail; 6:30, heavy sea from
 " " westward.
- " 26, P. M. Plunging into head sea.
- " 27, A. M. Hard squalls and heavy Westerly swell.
- " 28, P. M. Fresh gale, with high sea; shipping
 " " water amidships.
- " 29, P. M. Shipping heavy water; ship straining
 " " badly; heavy lurches.
- " " A. M. Find seams in foredeck leaking; put on
 " " tar and oil, through straining.

- “ 30, P. M. Ship rolling and straining; rolling
 “ “ heavy and shipping water. 5 A. M. Ship
 “ “ plunging heavy; 8 A. M., hard squalls, ship-
 “ “ ping large bodies of water between the
 “ “ squalls; 11 A. M., hard gale, still laboring and
 “ “ straining heavy; Williams, A. B., and appren-
 “ “ tice on the sick list; Barometer, 29.20.
- Oct. 1st, P. M. Ship laboring and straining and ship-
 “ “ ping large bodies of water all over; sea
 “ “ making; 8 to 10 P. M., decks continually
 “ “ flooded all over; 2 A. M., terrific squalls and
 “ “ increasing; 6 A. M., all hands stowed fore
 “ “ topsail and foresail; wind blowing with hurri-
 “ “ cane force; a continual drift fore and aft;
 “ “ shipping large bodies of sea water; decks
 “ “ continually full; weather too bad to sound
 “ “ pumps; watch chance to get fore and aft.
 “ “ Bar. 28.80.
- Oct. 2nd, P. M. Still continuous hard gale, decks con-
 “ “ tinually flooded, shipping large bodies of
 “ “ water fore and aft; A. M. Terrific squalls,
 “ “ sleet and snow; Williams and apprentice on
 “ “ sick list.
- Oct. 3rd, P. M. Gale from N. W. still continues, ship
 “ “ laboring heavy, high sea from the Westward,
 “ “ shipping large bodies of water; 8 o'clock, ter-
 “ “ rific squalls. Barometer, 28.50.
- Oct. 4th, P. M. Ship rolling heavy and straining, ship-
 “ “ ping large quantities of water; 7 o'clock, in
 “ “ jibing, the spanker boom broke, doing con-

- “ “ siderable damage. 2 A. M. Gale started
 “ “ afresh; tremendous sea; 8:30, the starboard
 “ “ fore topsail sheet broke and sail split, all
 “ “ hands stowed the sail; using oil from the star-
 “ “ board forward and after closets, in all about 4
 “ “ gallons; Bar. 28.40.
- Oct. 5th, 11 P. M. Gale again increasing, shortening
 “ “ sail; dangerous to get fore and aft; tremend-
 “ “ ous bodies of water falling and breaking on
 “ “ board; upper main topsail down-haul carried
 “ “ away through the heavy lurching; lashed the
 “ “ two yards together; short of fresh water, can
 “ “ not get to fresh water tank. Bar. 28.50.
- Oct. 6th, P. M. Ship laboring and straining badly,
 “ “ shipping large bodies of water, galley and
 “ “ deck houses continually flooded. 2 A. M. Gale
 “ “ again increases with terrific force, ship labor-
 “ “ ing and straining, decks continually full of
 “ “ water; no chance to serve out fresh water yet;
 “ “ 2nd mate, Williams, and apprentice on sick
 “ “ list. Bar. 28.60.
- Oct. 7th, P. M. Gale still blows with same violence and
 “ “ ship struggling to keep decks free from water;
 “ “ 2nd mate and apprentice laid up sick.
- Oct. 8th, 2nd mate, Williams, and boatswain on the
 “ “ sick list.
- Oct. 9th, 2nd mate, boatswain, and Williams still on
 “ “ sick list; find that a considerable quantity of
 “ “ sea water had gone down fore hold through
 “ “ the decks.

- Oct. 11th, 4 P. M. Breeze increasing rather quickly;
 “ “ continuous seas breaking on board and flood-
 “ “ ing the decks fore and aft; 11 P. M., sea
 “ “ broke on the quarter deck and smashed the
 “ “ chicken coop to leeward. 2 A. M. Rolling
 “ “ terrific, decks full of water, ship straining
 “ “ badly, wind going down and leaving the sea;
 “ “ carpenter looking over cargo fore and aft; 2nd
 “ “ mate, boatswain, and Williams, A. B., sick.
- Oct. 12, A. M. Hands employed shifting cargo fur-
 “ “ ther aft and higher to ease the ship; 2nd mate
 “ “ and Williams still sick.
- Oct. 13, P. M. Fresh gale, with increasing squalls;
 “ “ 1:30 the bee of the outer jib stay carried
 “ “ away—secured the sail and stay; 2:30, the
 “ “ inner jib stay carried away—all hands secured
 “ “ the sail and stay, and took in upper topsails;
 “ “ squalls blowing with terrific violence; 10:00,
 “ “ ship rolling terrible and filling the decks fore
 “ “ and aft; 2nd mate and Williams sick.
- Oct. 14, Midnht. Hard gale, which continues; ship
 “ “ laboring and straining and shipping large
 “ “ bodies of water all over. A. M. Still con-
 “ “ tinues hard gale, increasing to high gales at
 “ “ noon; 2nd mate and Williams sick.
- Oct. 15, P. M. Gale increasing, bad threatening ap-
 “ “ pearance; 2 P. M., terrific squalls, the lee main
 “ “ topsail sheet carried away; while securing the
 “ “ main, the foretopsail went to pieces at once;
 “ “ the lee main lift also carried away; later the

- “ “ mizzen staysail went to pieces; ship now
 “ “ under bare poles, tremendous sea running,
 “ “ using oil from lee closets—about 10 gallons.
 “ “ Midnight. No abatement; ship struggling to
 “ “ free herself of weight of water on deck; port
 “ “ maintopmast backstay gone. 2 A. M. Terrific
 “ “ sea broke on the ship at fore rigging, taking the
 “ “ two boats with all gear attached from forward
 “ “ skids; the gale broke again with hurricane
 “ “ force, with a clean drift; 8 A. M., still con-
 “ “ tinues; port forecastle door stove, also the
 “ “ galley door; places flooded; 2nd mate and
 “ “ Williams sick.
- Oct. 16, P. M. High gale still continues without
 “ “ taking off; decks still flooded, and ship strain-
 “ “ ing badly. Midnight. Wind taking off, but
 “ “ a tremendous sea running; decks full of
 “ “ water and people generally being knocked
 “ “ down. Noon. Find the starboard bulwarks
 “ “ started inward from fore house to main
 “ “ hatch; seams along the main deck open bad.
- Oct. 17, 6:30 P. M. The gale again started, by 8
 “ “ o'clock blowing with hurricane force, and con-
 “ “ tinuing until 4 o'clock A. M.; tremendous sea
 “ “ running; no fresh water served out to-day—
 “ “ no chance.
- Oct. 18, P. M. Gale from W. S. W. and heavy sea
 “ “ running, shipping large bodies of water, con-
 “ “ tinuing until midnight; 2nd mate and Will-
 “ “ iams, A. B., sick. Bar. 29.50.

- Oct. 19, P. M. Fresh gale, heavy head sea; A. M.
 “ “ No sun to-day; this is just miserable, the ship
 “ “ tumbling about between the squalls with the
 “ “ decks full of water most of the time; Williams
 “ “ still sick. Bar. 29.50.
- Oct. 20. P. M. Fresh gale and squalls of sleet and
 “ “ snow. Noon. Heavy gale struck the ship; all
 “ “ hands out; 2nd mate and Williams still sick.
 “ “ Bar. 29., falling.
- Oct. 21, P. M. Commences with living gale from N.
 “ “ W.; all hands out; 3 P. M., the mizzen staysail
 “ “ blew to pieces in a terrific squall; sea running
 “ “ high and choppy, shipping large bodies of
 “ “ water; no water served out; 8 P. M., still
 “ “ blowing with increased fury; ship laboring
 “ “ and straining; watch below standing by
 “ “ handy; Midnight, the same; 4 A. M., found
 “ “ ventilator cover on forward house unshipped
 “ “ broken; recovered the same with canvas; sea
 “ “ water going down; 2nd mate and Williams,
 “ “ A. B., still sick, Apprentice Rogers also; Bar.
 “ “ 28.50.
- Oct. 22, P. M. High gale still continues from S. W.;
 “ “ 8 P. M., gale again increases with violence;
 “ “ 2nd mate and Williams, A. B., sick. Bar.
 “ “ 28.80.
- Oct. 23, P. M. Moderate gale from S. W.; heavy
 “ “ Westerly swell; ship rolling heavy; Williams
 “ “ sick, 2nd mate at duty; Bar. 29.20.
- Oct. 24, Fresh gale; ship laboring and straining.

- Oct. 25, P. M. Gale commences at once with renewed
 “ “ force; 4 o'clock, high dangerous sea running,
 “ “ shipping large bodies of water; no fresh water
 “ “ served out; poor chance to get fore and aft.
 “ “ A. M. Cook laid up; Huxley, A. B., Breiner,
 “ “ A. B., Williams, A. B., and Cluinie, in galley—
 “ “ four hands from port watch; 5 A. M., still
 “ “ blowing hard gale; ship laboring and straining
 “ “ badly; all houses on deck flooded; short of
 “ “ water for dinner; fore hold and 'tween decks
 “ “ fair flooded; must have had large quantities
 “ “ of water below through the seams.

(On the two pages that follow is a summary of the gear, blocks, sheaves, and cabin stores lost, broken and carried away or otherwise destroyed by the recent heavy weather.)

- Oct. 26, P. M. Gale from S. W. still continues, ship
 “ “ laboring and straining badly, decks still
 “ “ flooded fore and aft; short of fresh water,
 “ “ could not get to the pump; midnight, sea
 “ “ going down. 8 A. M. Took forward and
 “ “ after hatches off, find the cargo saturated
 “ “ with water through the excessive straining of
 “ “ the ship and decks; about nine weeks' supply
 “ “ of fresh water remaining; Williams, Breiner,
 “ “ and Huxley, A. Bs., sick.
- Oct. 27, After grave consideration, and consultation
 “ “ with officers and tradesmen, re the damage
 “ “ done to the ship since Sept. 27 to date and
 “ “ the continuous wind and storms encountered,

- “ “ and the state of the ship generally, settling
 “ “ down with the constant leakage through the
 “ “ decks after the great laboring and straining,
 “ “ decided to throw overboard from the ends of
 “ “ the ship, fore and after hatches, about 50
 “ “ tons in all. A start was made at noon with
 “ “ all hands at the fore hatch and 440, 220 in all,
 “ “ R. A. wet casks taken up; started after hatch
 “ “ and put out about the same amount; secured
 “ “ the rest of the cargo below, and battened
 “ “ down; at noon the inner jib bee block again
 “ “ carried away; secured sail and stay; Hansen
 “ “ and Williams sick; Breiner returned. Bar.
 “ “ 29.40.
- Oct. 28, P. M. Freshening gale; 4 P. M., fresh gale;
 “ “ 8 P. M., hard squalls, rain and sleet; midnight,
 “ “ the same. Bar. 29.30.
- Oct. 29. P. M. High gale and considerable sea run-
 “ “ ning, occasional seas coming on board; mid-
 “ “ night, strong squall, ship rolling heavily,
 “ “ straining aloft. Foster and Williams sick,
 “ “ Hansen returned.
- Oct. 30, P. M. Fresh Westerly gale and heavy sea,
 “ “ ship rolling and straining heavy, flooding the
 “ “ decks. Noon, hard gale, high sea. Williams
 “ “ on sick list.
- Oct. 31, Still continues fresh gale with high sea, ship
 “ “ rolling heavy, straining badly aloft, filling the
 “ “ decks at times; midnight, more moderate, sea
 “ “ going down. 8 A. M., took off after hatches

- “ “ and secured the cases from the after part
 “ “ more forward; carpenter overhauling below.
 “ “ Bar. 29.50.
- Nov. 1, 10 P. M. Squally; ship laboring some.
- Nov. 2, Midnight, hard gale, squalls; 5 A. M., hard
 “ “ squalls. Noon, shipping much water, hard
 “ “ squalls, heavy lurching aloft. Williams taking
 “ “ wheel and Breiner and Ask, A. B., sick, three
 “ “ from the port watch.
- Nov. 3, P. M. Fresh gale, with hard squalls, high
 “ “ sea, shipping much water, straining badly.
 “ “ A. M. Ship rolling heavy. Williams, Breiner
 “ “ and Ask returned; Foster, A. B., sick.
- Nov. 4, (108 days out—going East). P. M. Rolling
 “ “ about and filling the decks; sea running in
 “ “ both ways from N. W. to S. W.; 4 P. M., the
 “ “ same, doing no good; 6 P. M., tremendous
 “ “ rolling, and fearing the masts, put the ship
 “ “ off before the wind, and the ship doing no
 “ “ good, as shown from former positions, decided
 “ “ to run East by Cape of Good Hope.
- Nov. 5, P. M. Heavy roll of Westerly sea. Noon,
 “ “ plenty rolling.
- Nov. 6, P. M. Ship rolling heavy, straining aloft;
 “ “ midnight, clearing up. Foster sick.
- Nov. 7, P. M. Commences with fresh gale from N.
 “ “ W. Foster still sick.
- Nov. 8, P. M. Strong gale from N. W.; 8 P. M.,
 “ “ squalls still severe. A. M. Had fore hatches
 “ “ off; 'tween decks and hold look much better.
 “ “ Bar. 29.50.

- Nov. 10, P. M. Sea rolling up from N. W.; at mid-
 “ “ night suddenly gale broke with terrific force,
 “ “ ship laying right down, with only close reefs,
 “ “ continues until 2 A. M., leaving a tremendous
 “ “ sea, breaking at times; 4 A. M., sea still
 “ “ wicked, shipping large quantities of water
 “ “ fore and aft; ship laboring very badly, labor-
 “ “ ing to such an extent that we are afraid of
 “ “ our masts; feel sure that the cargo in lower
 “ “ hold must have broken adrift and settled down
 “ “ during the heavy weather we experienced off
 “ “ Cape Horn; the constant flooding of the decks
 “ “ has not as yet allowed us to fully ascertain the
 “ “ condition of the cargo in the lower hold. Bar.
 “ “ 29.50. Foster still sick.
- Nov. 11, P. M. Ship still rolling heavy and straining
 “ “ aloft. Noon. Fine and pleasant.
- Nov. 12, P. M. Sea still keeps up, ship rolling con-
 “ “ siderable, heavy swell from N. W. A. M.
 “ “ Calms; 8 A. M., falling off into the sea, rolling
 “ “ tremendous, heavy strain on masts and rig-
 “ “ ging.
- Nov. 13, Noon. Fresh gale from the Eastward. Bar.
 “ “ 29.40.
- Nov. 14, P. M. Strong gale from S. E.; 4 P. M.,
 “ “ hard gale; 6 P. M., the same; midnight, sea
 “ “ running cross, ship rolling and tumbling about,
 “ “ shipping quantities of water. Foster again
 “ “ laid up. Bar. 29.50.

- Nov. 15. P. M. Heavy Westerly sea rolling up; mid-
 “ “ night, fresh gales with squalls. 1:20 A. M.,
 “ “ high gale, choppy sea breaking on board all
 “ “ over. Bar. 29.40.
- Nov. 16, P. M. Hard squalls from S. W. with heavy
 “ “ sea on, shipping large bodies of water, rolling
 “ “ and straining badly. A. M. Still shipping
 “ “ plenty of water.
- Nov. 18, Noon. Fresh gale, sea making. Foster still
 “ “ sick.
- Nov. 19, P. M. Strong gale with hard squalls; 8
 “ “ P. M., shipping heavy water all over; 9 P. M.,
 “ “ gale continues with increased force, raising a
 “ “ tremendous sea, ship laboring and straining,
 “ “ decks constantly full of water; midnight, the
 “ “ same, no abatement. A. M. The same. Bar-
 “ “ ometer, 29.40, falling; find the gear at main
 “ “ mast and rigging all washed down from pins
 “ “ and towing at scuppers and ports; damage to
 “ “ pots, etc., in galley. Noon. Less wind, but sea
 “ “ still running high.
- Nov. 20. P. M. High gale with tremendous sea
 “ “ running; 6 P. M., blowing with hurricane
 “ “ force, ship laboring and straining to keep
 “ “ free from heavy seas breaking at times fore
 “ “ and aft, flooding every part. 4 A. M. Shipped
 “ “ sea over lee quarter, knocking cabin door in
 “ “ chart house open, flooding the cabin and chart
 “ “ room, finding its way to store room, and dam-
 “ “ aging a quantity of stores; cook badly off for

- “ “ pots; 10 A. M., sea still running high, but not
 “ “ with such force; again short of fresh water.
 “ “ Foster still sick.
- Nov. 21, P. M. A. M. Sea rolling up from
 “ “ S. W., causing ship to roll badly, straining
 “ “ aloft; find the bands on the upper main top-
 “ “ gallant yard, in the slings of the yard, all
 “ “ adrift; decided calling at an Australian Port,
 “ “ possibly Sidney, N. S. W. Foster still sick.
- Nov. 22, P. M. Cross sea from S. W., causing the ship
 “ “ to roll heavy, shipping large quantities of
 “ “ water at short intervals, straining aloft badly;
 “ “ the cook reports his last saucepan broken; the
 “ “ Captain reports Parkes chronometer stopped
 “ “ four hours after winding up; cleaning out
 “ “ paint drums for cooking. Foster still sick.
- Dec. 5, Midnight. Fresh gale, squally. A. M. The
 “ “ same, shipping quantities of water, most
 “ “ amidships.
- Dec. 9, Midnight. Ship running with whole topsail,
 “ “ cross sea, shipping quantities of water; 5 A.
 “ “ M., the same.
- Dec. 10, 8 P. M. Increasing breezes; midnight, the
 “ “ same. 2 A. M. Fresh, N. W., sea still
 “ “ running, shipping bodies of water.
- Dec. 13, Midnight, strong breezes, shipping large quan-
 “ “ ties of water. 8 A. M., gale still blowing
 “ “ hard; noon, heavy sea.
- Dec. 14, P. M. Fresh gale from S. W., heavy sea
 “ “ running, shipping large bodies of water.

- Dec. 18, 8 P. M. Fresh gale, high sea, shipping
 “ “ water; midnight, the same. A. M., the same;
 “ “ noon, fresh gale increasing.
- Dec. 19, P. M. Fresh gale, high sea; 4 P. M., high
 “ “ gale, shipping water.
- Dec. 21, P. M. High sea running, shipping quantities
 “ “ of water.
- Dec. 24, 7 P. M. Wind shifted to S. W., increasing
 “ “ gale; 8 P. M., height of gale. Noon. Ship-
 “ “ ping heavy water.
- Dec. 25, P. M. High gale from S. W., heavy sea run-
 “ “ ning, shipping large bodies of water, decks
 “ “ full at times; 8 P. M., still continues. Noon.
 “ “ Still heavy swell, ship rolling gunwales under
 “ “ both sides.
- Dec. 26, P. M. Sea going down, still heavy swell from
 “ “ S. W., ship rolling and tumbling about, decks
 “ “ full of water at intervals.
- 1900.
- Jan. 10, 8 P. M. In wearing ship, heard something go
 “ “ “bang” at the steering gear and at 8:30
 “ “ another clang; took off steering cover, and
 “ “ found the pin on the port side of rudder head
 “ “ broken in two and the arm hanging down;
 “ “ put on relieving tackles and made temporary
 “ “ repairs.
- Jan. 11, 8 P. M. Fresh gale from the Northward.
- Jan. 12, 2:30 P. M., anchored in Watson’s Bay.

